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CASE:GLS: 131059-02
CC:GLS:PCTL:DIngold

MEMORANDUM FOR SUSAN E. GILBERT

ACTING CHIEF, GRANT ADMINISTRATION
WAGE & INVESTMENT OPERATING DIVISION
STAKEHOLDER PARTNERSHIPS, EDUCATION &
COMMUNICATION (W&I:SPEC)

FROM:

Donald M. Suice *for*
Chief, Public Contracts and Technology Law Branch (GLS)

SUBJECT:

Low-Income Tax Clinic Grants Matched With Legal Services
Corporation Funding

This responds to your request for guidance on whether Low-Income Tax Clinic (LITC) grant recipients can use Legal Services Corporation (LSC) funding as matching funds for LITC purposes.

Conclusion:

An argument could be made that LSC funds could be used to match. But, the stronger position, for reasons that follow, is that they may not.

Discussion:

A. OMB's Informal Opinion:

We conferred informally with OMB's Grants Office, within its Office of Federal Financial Management. Mr. Gilbert Tran, a federal grant analyst on staff there, concurs that the stronger position is that LSC funds should not be used for matching purposes. However, the status of LSC, a federally legislated "private nonmembership nonprofit corporation," 42 U.S.C. § 2996b(a), "*not* . . . considered a department, agency, or instrumentality, of the

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Federal Government," 42 U.S.C. § 2996d(e)(1) (emphasis added), raises a question whether OMB's guidance is applicable.

B. The OMB General Rule:

Section 23 of OMB Circular No. A-110, entitled "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-profit Organizations," addresses cost sharing or matching in general. It says that "all contributions" shall be counted toward cost sharing or matching when "all criteria" listed therein are met, including the criterion that sums:

Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

Since the inception of the LTC grant program in 1998, the Service's Low-Income Tax Clinic Grant Application Package and Guidelines, re-issued annually as Pub. 3319, has incorporated by reference the entirety of OMB Circular No. A-110. Pub. 3319 also has always included a restatement of the OMB general rule: "Funds from other federal grants cannot be counted as matching funds unless authorized by statute." *See, e.g.* Pub. 3319 (Rev. 4-2002), II(B)(2), fifth bullet, p. 7.

C. The Comptroller General's Perspective:

OMB Circular No. A-110 cites no federal statute, or other authority, as the source of its general rule. The Comptroller General has opined that this rule is one of common-sense; to hold otherwise – unless there is an express exception or some other indicia of an overriding reason – defeats the requirement that costs be shared.

Decisions of the Comptroller General are not binding upon executive branch agencies. *See Bowsher v. Synar*, 478 U.S. 714, 727 -32 (1986). Nevertheless, the opinions of the General Accounting Office (GAO) constitute a valuable and informative body of precedent. This is particularly so where the matter involves the propriety of the commitment, obligation, and expenditure of appropriated funds.

On the subject of matching one grant with funds from another, GAO's Principles of Federal Appropriations Law, (2nd Ed., Vol. II, p. 10-62) says:

An important and logical principle is that neither the federal nor the non-federal share of a particular grant program may be used by a grantee to

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match funds provided under another federal grant program, unless specifically authorized by law. In other words, a grantee may not (1) use funds received under one federal grant as the matching share under a separate grant, nor may it (2) use the same grantee dollars to meet two separate matching requirements. [*Citations deleted to four decades of GAO opinions; see, e.g., 56 Comp. Gen. 645 (1977)*]. A contrary rule would largely nullify the cost-sharing objective of stimulating new grantee expenditures.

The discussion of this issue by GAO includes the note: "Normally, exceptions to the rule are in the form of express statutory authority. A prominent example is . . . 42 U.S.C. § 5305(a)(9) . . ." *Id.* The cited example comes from what were referred to as community development block grant funds. This statute has been amended since cited and discussed by GAO. However, the exception to the "general," or "logical," rule remains intact. The reference in the Code section has been broadened to all federal assistance programs funded under chapter 53 of title 42, United States Code. Pub. Law 97-35 § 309(f)(3).

D. LSC's Characterization of its Funding and the Effect of its Rules:

LSC is a federally legislated "private nonmembership nonprofit corporation," 42 U.S.C. § 2996b(a), deemed not to be an "instrumentality of the Federal Government," 42 U.S.C. § 2996d(e). An advocate for the point of view that LSC funds could be used for federal grant matching purposes might argue that funds that LSC distributes are not "paid by the Federal Government" because LSC is not an instrumentality of the Federal Government. Nevertheless, the purpose of the OMB rule is such that it is reasonable to apply it. Also, restrictions that LSC imposes on recipients of its funds require this effect.

LSC is authorized to be appropriated federal funds, 42 U.S.C. § 2996i(a). LSC is also authorized to receive non-federal funds, 42 U.S.C. § 2996i(c). Notwithstanding this authority to receive non-federal funding, LSC's official web-site says that LSC "receives 100 percent of its budget from Congress," and, thus, "supports a strong federal role in the funding of legal services so the poor will have somewhere to turn when in crisis."

[Http://www.lsc.gov/welcome/welcome.htm](http://www.lsc.gov/welcome/welcome.htm) .

LSC's provision of financial assistance takes the form of contracts and grants that it awards. See 42 U.S.C. § 2996e(a)(1)(A); 45 C.F.R. Chapter XVI. LSC regulations identify federal laws that apply to recipients of LSC funds, noting, for purposes of these laws, that "LSC shall be considered a Federal agency and a recipient's LSC funds shall be

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considered to be Federal funds provided by grant or contract." 45 C.F.R. Part 1640; § 1640.2(a)(2). Laws listed include criminal statutes that pertain to "false, fictitious or fraudulent claims," 18 U.S.C. § 287, the "conversion of public money," 18 U.S.C. § 641, "obstruction of Federal audit," 18 U.S.C. § 1516, and provisions of the civil sanction for "false claims," 31 U.S.C. § 3730.

LSC imposes "cost standards and procedures" on its financial assistance recipients. These requirements include the condition that expenditures not be "used to meet cost sharing or matching requirements of any other federally financed program, unless the agency whose funds are being matched determines in writing that Corporation funds may be used for federal matching purposes." 45 C.F.R. § 1630.3(a)(5). To make this determination, in light of the OMB general rule, the Service, as the "other federally financed program," would have to cite to a statute that permits LSC funds to be matched with LITC funds. To the best of our knowledge, no such authority exists.

Section 7526 of the Internal Revenue Code is the statutory authority for the LITC grant program. It refers to the requirement that LITC grants be matched in both the general authorization provision and in a specially noted requirement:

(a) In general—

The Secretary may, subject to the availability of appropriated funds, make grants to provide matching funds for the development, expansion, or continuation of qualified low-income taxpayer clinics.

* * * * *

(c) Special rules and limitations —

* * * * *

(5) Requirement of matching funds —

A low-income taxpayer clinic must provide matching funds on a dollar-for-dollar basis for all grants provided under this section. Matching funds may include --

- (A) the salary (including fringe benefits of individuals performing services for the clinic; and
- (B) the cost of equipment used in the clinic.

Indirect expenses, including general overhead of the institution sponsoring the clinic, shall not be counted as matching funds.

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Section 7526 does not authorize LSC funds to be used for the purpose of meeting the matching requirements of obtaining LITC funds. Nor does it authorize other federally appropriated funds to be used to meet its matching requirement.

In summary on this point, we analogize the analysis of whether LSC funding can be used to match LITC grants to a dog's chasing its tail. LSC's regulations provide that LSC funds cannot be used to meet cost sharing or matching requirements of another federally financed program match unless the agency whose funds are matched makes a written determination that LSC funds may be used for matching purposes. To do so, there would have to be a statute that overrides the OMB general rule. No such statutory exception to the regulatory OMB general rule exists. Thus, we conclude that LSC funds should not be used to meet LITC matching requirements.

Recommendation:

[REDACTED]

DP

If you or others have any question about this opinion, you may call Dave Ingold at 202 283-7952.